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**IN THE
COURT OF APPEALS OF INDIANA**

ADEL YAZIDI,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 44A04-0607-CR-354
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE LAGRANGE SUPERIOR COURT
The Honorable George E. Brown, Judge
Cause No. 44D01-0403-MR-1

March 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Adel Yazidi appeals from his three convictions for Class A felony attempted murder. We affirm.

Issues

Yazidi raises two issues for our review, which are:

- I. whether jury instructions for attempted murder including the word “knowingly” constituted fundamental error; and
- II. whether there is sufficient evidence to prove that Yazidi acted with specific intent.

Facts

Saleh Obad (“Sam”) and his wife Ella Wampler (“Ella”) own and operate a junkyard in LaGrange County. In late 2003, Sam and Ella left the United States for an extended period of time and asked their friend Yazidi to oversee the business while they were away. When Sam and Ella returned in March 2004, they had a disagreement with Yazidi about the manner in which he handled the business’s finances while they were gone. At one point, Sam told Yazidi that if they weren’t able to resolve their argument, Sam would report Yazidi to the police. Yazidi responded, “do whatever you can, and you’ll see.” Tr. p. 214. Sam interpreted Yazidi’s statement as some sort of threat. Shortly thereafter, Yazidi began driving past Sam and Ella’s business multiple times each day for a period of a couple days.

On March 24, 2004, Sam, Ella, and another man, Saif Muthana (“Cal”), were standing outside the business and saw Yazidi drive past. Sam and Cal got into a truck

and decided to follow Yazidi in an attempt to meet up with him so they could talk. Yazidi turned his vehicle around and again drove past the business. Ella saw Yazidi pass by again and called Sam to tell him that Yazidi had again driven past the business. Sam and Cal returned to the business, got into a vehicle that Ella was driving, and began to follow Yazidi in the opposite direction so that they could talk.

Several minutes later, Yazidi pulled into the driveway of Michiana Laminated, a nearby business. Yazidi parked his car and exited the vehicle holding a rifle. He then leaned over the top of the car, and, using the car to support the rifle, pointed it toward the road. The vehicle in which Ella, Sam, and Cal were riding soon appeared in front of Yazidi, and he fired approximately nine shots at it. The majority of the bullets made contact with the vehicle and hit its hood and the front and side panels. One bullet passed through the window of a nearby home and struck a wall and kitchen cabinet. No one in the vehicle was injured. Following the shooting, Yazidi drove away.

On March 25, 2004, the State charged Yazidi with three counts of attempted murder. A jury found him guilty of all three counts. Yazidi now appeals those convictions.

Analysis

I. Jury Instructions

Yazidi first argues that the trial court committed fundamental error by including the word “knowingly” in its instructions defining attempted murder. Although we agree that the jury in this case was not ideally instructed, we conclude that the error in these instructions was not so egregious that it rises to the level of fundamental error.

More than a decade ago, our supreme court decided Spradlin v. State, 569 N.E.2d 948 (Ind. 1991) and held that, “by definition, there can be no ‘attempt’ to perform an act unless there is a simultaneous ‘intent’ to accomplish such act. Simply stated, in order to attempt to commit a crime, one must intend to commit that crime while taking a substantial step toward the commission of the crime.” Spradlin, 569 N.E.2d at 951. A jury must be instructed that proof of the requisite mens rea is required. Id. With regard to jury instructions given in attempted murder cases, our supreme court has “established that it [is] reversible error for a trial court to instruct a jury that a ‘knowing’ mens rea [is] sufficient to establish guilt of attempted murder.” Williams v. State, 737 N.E.2d 734, 736 (Ind. 2000) (quoting Spradlin, 569 N.E.2d at 951).

Both this court and our supreme court have issued myriad warnings regarding the error that is committed when a trial court fails to instruct the jury regarding the “vital ‘specific intent’ requirement.” Greer v. State, 643 N.E.2d 324, 326 (Ind. 1994). Nonetheless, the trial court in this case issued the following instructions with which Yazidi takes issue:

PRELIMINARY INSTRUCTION NO. 5 . . . The statute defining the offense of **Murder**, which was in force at the time of the offense charged reads (in part) as follows:

A person who knowingly or intentionally kills another human being commits murder.

The statute defining **Attempt**, which was in force at the time of the offense charged reads (in part) as follows:

A person attempts to commit a crime when acting with the culpability required for commission of the crime, he

engages in conduct that constitutes a substantial step toward commission of the crime.

* * * * *

FINAL INSTRUCTION NO. 3 . . . In order to sustain the charge of Attempted Murder, the State must prove the following propositions beyond a reasonable doubt:

First: Adel A. Yazidid performed an act, that is, firing a long gun continuously at the occupants of Saleh's vehicle, which constituted a substantial step toward the commission of the crime of murder.

Second: When he performed that act, Adel A. Yazidi did so with the specific intent to kill the occupants of Saleh's vehicle

Third: Adel A. Yazidi engaged in such conduct knowingly or intentionally.

If you find from your consideration of all of the evidence that any one of these propositions has not been proven beyond a reasonable doubt, then you should find the defendant not guilty.

However, if you find from your consideration of all of the evidence that all of these propositions have been proven beyond a reasonable doubt, then you should find the defendant guilty.

* * * * *

FINAL INSTRUCTION NO. 4 . . . The statute defining the offense of Murder, which was in force at the time of the offense charged reads, in part, as follows:

A person who knowingly or intentionally kills another human being commits murder.

The statute defining Attempt, which was in force at the time of the offense charged reads, in part, as follows:

A person attempts to commit a crime when acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime.

* * * * *

FINAL INSTRUCTION NO. 5 . . . Indiana criminal law provides that a person who knowingly or intentionally kills another human being commits murder. A person attempts murder when, acting with the culpability required for the commission of murder, he or she engages in conduct that constitutes a substantial step towards the commission of murder. Attempted murder is a specific intent crime. That means the State must prove beyond a reasonable doubt that the defendant specifically intended to kill the victim(s).

App. pp. 55, 69-71.

Clearly, at least some of these instructions instructed the jury that it could find Yazidi guilty of attempted murder if the State proved that he acted either knowingly or intentionally. Pursuant to Spradlin, such instructions were given in error and could have allowed the jury to conclude that because Yazidi “knowingly” fired his rifle at the vehicle in which Sam, Ella, and Cal were riding, he committed attempted murder. See Greer, 643 N.E.2d at 326. When a defendant objects at trial to a tendered instruction and the trial court has had an opportunity to remedy the error, an erroneous instruction on the elements of attempted murder yields an automatic reversal. Id.

Here, however, Yazidi concedes that he failed to lodge an objection to the jury instructions tendered during his trial. As such, he argues he is entitled to relief because the improper instructions amounted to fundamental error. “Fundamental error is error so egregious that reversal of a criminal conviction is required even if no objection to the

error is registered at trial.” Gamble v. State, 831 N.E.2d 178, 185 (Ind. Ct. App. 2005), trans. denied (quotation omitted) (citation omitted). “A claim of fundamental error is not viable absent a showing of grave peril and the possible effect on the jury’s decision.” Dawson v. State, 810 N.E.2d 1165, 1175 (Ind. Ct. App. 2004), trans. denied (quotation omitted) (citation omitted).

When a trial court erroneously instructs a jury regarding the mens rea necessary for a defendant to have committed attempted murder, such error is fundamental if the instructions as a whole fail to inform the jury that the defendant must have intended to kill the victim. Greer, 643 N.E.2d at 326. “Error in an attempted murder instruction does not rise to the level of fundamental error where either 1) the instructions as a whole sufficiently inform the jury of the requirement of intent to kill; and/or 2) the intent of the perpetrator was not a central issue at trial.” Clay v. State, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002). We conclude that, as a whole, the instructions in this case sufficiently informed the jury that the State was required to prove Yazidi had specific intent to kill in order to convict him of the crime of attempted murder. Any error that was made in instructing the jury in this case does not rise to the level of fundamental error.

In Yerden v. State, 682 N.E.2d 1283, 1285 (Ind. 1997), our supreme court evaluated the follow instruction, which is nearly identical to those Yazidi challenges.

ATTEMPT MURDER

A Person attempts to commit a crime when he knowingly or intentionally engages in conduct that constitutes a substantial step toward the commission of the crime.

The crime of Murder is defined by statute as follows:

A person who knowingly or intentionally kills another human being commits Murder.

To convict the Defendant of Attempt Murder, in this case, the State must have proved each of the following elements:

1. The Defendant knowingly
2. Engaged in conduct that constituted a substantial step toward the commission of
3. Knowingly killing another human being.

The Defendant must have had the specific intent to commit Murder in order to be found guilty of Attempt Murder. Intent to kill may be inferred from the use of a deadly weapon in a manner reasonably calculated to cause death.

Yerden, 682 N.E.2d at 1285.

In a cursory analysis, the Yerden court concluded: “The enumerated elements of the crime in this instruction were erroneous . . . We find that the instruction, on the whole, adequately informed the jury that Yerden must have intended to kill Bergstresser. The last two sentences of the instruction state that Yerden must have had specific intent to commit murder.” Id. at 1285-86 (quotations omitted) (citations omitted).

Here, all of the instructions with which Yazidi takes issue define the mens rea necessary for a conviction as “knowingly or intentionally.” However, the third and fifth final instructions specify that Yazidi was required to have acted with specific intent to kill. The fifth preliminary instruction and fourth final instruction, too, refer to specific intent where they delineate that a defendant attempts to commit a crime when “acting with the culpability required for commission of the crime.” App. pp. 55, 70. That mens rea can be easily ascertained by referring to the third and fifth final jury instructions. We

conclude that the jury instructions, as a whole, adequately informed the jury a conviction required proof that Yazidi acted with specific intent to kill when he fired his rifle at the vehicle in which Sam, Ella, and Cal were traveling. The Spradlin error that Yazidi identifies does not rise to the level of fundamental error.

II. Sufficiency of Evidence

Yazidi next contends that the State's evidence was not sufficient to prove that he had specific intent to kill Sam, Ella, and Cal when he fired his rifle at their vehicle. When an appellant challenges the sufficiency of the evidence to support a conviction, "we neither reweigh the evidence nor judge the credibility of the witnesses, and we affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." Wright v. State, 828 N.E.2d 904, 905-06 (Ind. 2005). It is the rare instance when an appellate court in this state has overturned a murder or attempted murder conviction because the State failed to present sufficient evidence of intent. See Kiefer v. State, 761 N.E.2d 802, 805 (Ind. 2002).

In order to succeed in a prosecution for attempted murder, the State must prove that the defendant had a specific intent to kill. Id. This mens rea may be inferred from the nature of the attack and the circumstances surrounding the crime or from the use of a deadly weapon in a manner likely to cause death or great bodily harm. Id. Discharging a weapon in the direction of a victim is substantial evidence from which a jury could infer intent to kill. Corbin v. State, 840 N.E.2d 424, 429 (Ind. Ct. App. 2006).

Here, Yazidi fired multiple shots at the vehicle in which Sam, Ella, and Cal were riding, and the majority of the shots made contact with their target. He clearly fired his rifle in the direction of his victims as discussed by this court in Corbin. Yazidi's use of the rifle in this manner could easily have resulted in death or great bodily harm to Sam, Ella, and/or Cal, and the jury could properly have inferred specific intent from this action.

Yazidi points out that none of the bullets entered the passenger compartment, the gasoline tank, or punctured the vehicle's tires. Yazidi further draws our attention to his claim that he is an experienced marksman and seems to posit that if he had intended to harm Sam, Ella, and/or Cal with his shots, he was capable of doing so. This is not a novel argument. In Fight v. State, 759 N.E.2d 1131, 1135 (Ind. Ct. App. 2001), rev'd in part on other grounds, 768 N.E.2d 881 (Ind. 2002), we summarily disposed of the same argument and stated:

Fight offers the fact that he is an experienced marksman, who could have killed the officers if he had wanted to, to demonstrate that he had no intent to kill the officers because only one officer was injured. This is a self-serving argument that we are not inclined to accept.

We reach the same conclusion here. We further conclude that Yazidi's argument is a request to reweigh the evidence, and that is a task that we may not undertake.

Conclusion

The Spradlin error Yazidi identifies does not constitute fundamental error because the jury instructions, as a whole, adequately informed the jury that Yazidi must have intended to kill Sam, Ella, and Cal. Yazidi's intent to kill may reasonably be inferred from the circumstances surrounding the crime and from the fact that Yazidi used his rifle

in a manner likely to cause death or great bodily harm when he discharged it in the direction of his victims. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.